APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 84-4727

MISCO, INC.,
Plaintiff-Appellees
v.
UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, and QUACHITA LOCAL 654,
Defendants-Appellants.

Aug. 19, 1985

Appeal from the United States District Court
for the Western District of Louisiana

Before GEE, TATE, and HIGGINBOTHAM, Circuit Judges.

GEE, Circuit Judge:

In today's case we review a determination by the district court that the award of an arbitrator contravenes well-defined public policy and hence should not be enforced.

In the course of an opinion perhaps most kindly described as whimsical,[1] the arbitrator noted the following

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[1] The opinion observes at its outset, for example: "The Arbitrator informed the parties that he is a Creek American Indian." This curious item is matched by equally curious reasoning. At one point, for example, the arbitrator criticizes the employer for not having the investigation of Cooper's incident conducted by "some higher, detached Company official," notwithstanding that it was

facts, among others, as established by the evidence that he heard. The employer's plant, where grievant Cooper worked, had a drug and drinking problem. The night shift in particular, of which Cooper was a member, had experienced problems with production and accuracy not encountered by the day shift. At an employee meeting called for the purpose, the employer had emphasized its strong policy against possession or use of drugs or alcohol on its premises. Cooper was aware of the employer's long-standing rule against bringing such substances onto plant premises or consuming them there.

Cooper's job was to operate an unusually dangerous machine called a slitter-rewinder, which cuts rolling coils of paper by means of sharp blades and which had caused numerous injuries. Operating such a machine with judgment and coordination impaired by substance abuses creates a safety hazard to the operator and to other employees. Cooper had been twice reprimanded for shoddy, inattentive work—the very type the employer believed might be attributable to such abuse—the last time on the day before the events leading to his discharge.

On the day in question, January 21, 1983, police searched Cooper's home under a warrant, finding several bags of marijuana, marijuana cigarettes, cigarette papers, and a weighing scale. While this was being done, another police officer had Cooper's automobile under surveillance on the plant parking lot. About 6:30 p.m., during shift working hours, Cooper and two companions came out of the plant and two or more of the three entered Cooper's car momentarily. The three then walked a short distance to another car and entered it. Some time later, the other two men returned to the plant, leaving Cooper sitting in

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directed by the president of the company, assisted by the production supervisor. At another, he concludes that the employer's immediate discharge of Cooper for drug use was not reasonable because another stated ground for discharge was unauthorized reading on duty.

the back seat of the car. He was apprehended there by police, with marijuana smoke in the air and a lighted marijuana cigarette in the front-seat ash tray.

Cooper refused to say who had been with him in the car, persistently denied that he had been using the drug—although found breathing its smoke—and at the arbitration hearing testified falsely under oath (so the arbitrator found) that he had not been in the car when apprehended but standing elsewhere in the parking lot. A search of his own car on the lot revealed a plastic scales case containing marijuana residue, although the employer did not know this last when it discharged him. On these facts, unaccountably reciting that "the Company has not proved by any level of evidence that the Grievant was in violation of the [substance abuse] Rule," the arbitrator directed the reinstatement of Cooper with full back pay, seniority, and so forth.[2] The district court, in main reliance on our decision in *Amalgamated Meat Cutters v.*

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[2] This baffing view of evidence that would with ease have sustained a civil verdict and probably a criminal conviction is perhaps partially explained by the circumstance that, by his academic degrees, the formal training of the arbitrator, a Dr. Milden J. Fox, Jr., was as an engineer and not as a lawyer. He seemed especially impressed, for example, by the fact that there was no direct testimony that anyone in the car where Cooper was found was *seen* to light a cigarette, and "it would have been difficult for [the surveilling officer] not to have seen someone light a cigarette. . . ." We can only view the quoted phrase as indicating doubt about whether there indeed *was* a lighted cigarette in the car, which in other portions of his writing the arbitrator treats as established: "The only thing that the Company has proven is that the Grievant was sitting in the back seat of a car in which there was found a lit marijuana cigarette in the front seat ashtray. . . ."

We note in passing that, although lacking personal experience in such matters, we had thought it common knowledge that the narcotic effect of marijuana can be obtained by simply sitting in a small enclosure where smoke from it is present. It is not clear from the record whether or not the car windows were closed, but—given that the incident occurred on an evening in late January—it is a reasonable inference that they were.

Great Western Food Co., 712 F.2d 122 (5th Cir. 1983), set aside the arbitrator's award as against well-defined public policy—the Louisiana law against possession of marijuana and the public policy, embodied in the employer's rule, against introduction of drugs into the work place and consequent operation of dangerous machinery by persons under their influence.

In *Amalgamated Meat Cutters*, a driver who admitted having been drinking had wrecked his employer's truck and was consequently discharged. The arbitrator, in an award reminiscent of the one we contemplate today, ordered his reinstatement because the employer failed to disprove to his satisfaction the driver's claim that equipment failure caused the wreck. As the district court noted, speaking of *Amalgamated* in its opinion in today's case:

> The district court enforced the arbitrator's award and the Fifth Circuit reversed. The basis of the appellate court's ruling was that the arbitrator's award violated "the public policy of preventing people from drinking and driving. . . ." *Amalgamated Meat Cutters, supra*, at 125. The court specifically found that the policy was sufficiently well defined and definite because the policy against drunk driving is "embodied in the case law, the applicable regulations, statutory law, and pure common sense. . . ." *Id.* In reaching this decision, the court noted:
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> > In a nation where motorists practically live on the highways, no citation of authority is required to establish that an arbitration award ordering a company to reinstate an over the road truck driver caught drinking on duty violates public policy. Alcohol impairs a person's coordination, and inhibits his ability to reason rationally. Ingestion of alcohol slows the reflexes. It induces drowsiness. It slows response time to external stimuli. It dulls the senses. In

> recognition of alcohol's undisputedly debilitating characteristics, every state in the union prohibits driving while under its influence. A driver who imbibes the spirits endangers not only his own life, but the health and safety of all other drivers. These considerations are convincing enough with respect to drivers of automobiles. They become even more compelling when the driver is regularly employed to course the highways in a massive tractor-trailer rig.

Id. at 124.

The same can be said of the intoxicating effects of marijuana. Similarly, an operator of a dangerous piece of industrial equipment can be said to present the same danger to himself and to his co-employees as an operator of a tractor-trailer rig does to fellow motorists. The Union argues that *Amalgamated Meat Cutters* can be distinguished from the instant case in that the truck driving employee admitted having consumed alcohol before the wreck. It is true that Cooper has consistently denied using or bringing marijuana onto Misco's premises; nonetheless, the arbitrator's findings of fact clearly indicate that the brown plastic case found in Cooper's car contained marijuana. Notwithstanding this fact, and the inferences to be drawn from it, the arbitrator still found that Cooper should be reinstated. It is true that the company did not know of the officer's discovery until shortly before arbitration began, but the real issue in this case is not when the company learned of the incident, but whether reinstatement is appropriate at this point.

We agree with Judge Stagg that *Amalgamated Meat Cutters* controls this case. In it we held that whether or not the wreck in question was caused by the driver's admitted consumption of spirits on the job, "[t]o enforce the arbitrator's award in this case, an award which com-

pels the reinstatement to driving duties of a truck driver who admittedly drank while on duty would violate . . . public policy." 712 F.2d at 125. Thus the employer's procedural omission to rule out mechanical failure as the proximate cause of the wreck simply did not matter.

In today's case, although Cooper denied it, the arbitrator found that—contrary to Cooper's untruthful testimony—he was apprehended on company premises in an atmosphere of marijuana smoke in another's car and marijuana was found in his own car on the company lot. The pertinent company rule, promulgated pursuant to a collective bargaining agreement provision permitting the company to impose rules,[3] provides, under the heading CAUSES FOR DISCHARGE:

> Bringing intoxicants, narcotics, or controlled substances into, or consuming intoxicants, narcotics or controlled substances in the plant, or on plant premises. Reporting for duty under the influence of intoxicants, narcotics, or controlled substances.

The rule draws no distinctions between "residue" and "usable quantities," nor need it do so. Yet, although Cooper violated it, the award directs his reinstatement at work on the slitter-rewinder. This is contrary to *Amalgamated Meat Cutters*, in which there was no finding that the driver was drunk, only that he had taken a drink on the job. In adopting plant rules, an employer is not narrowly limited to denouncing acts already made criminal by the law but may, at a minimum, adopt reasonable prophylactic measures going beyond the statutes. As examples, we think it scarcely open to doubt that rules forbidding the introduction of drug paraphernalia onto plant premises (with or without the accompanying drugs) or firearms (loaded or not) would be valid—and the

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[3] A portion of the collective bargaining agreement reserves to management the right "to unilaterally establish, modify, and enforce the plant rules or regulations and/or disciplinary procedures, policies and practices; . . . ."

former a valid expression of the policy which we have discussed. If so, it follows that a rule forbidding the introduction on plant premises of marijuana in any quantity whatever would be equally so.

The arbitrator in today's case, focusing chiefly on his conception of "industrial due process," ruled for Cooper in great part because the employer did not at the time it discharged him *know* of the marijuana residue that he undeniably brought onto the plant parking lot. That his ruling was in the teeth of the other evidence recited we need not further belabor, for that is not the point.

Rather, it is that his narrow focus on Cooper's procedural rights has led him to enter an award directing the employer to put Cooper back to operating a hazardous machine, dangerous to himself and to others, at a time when the arbitrator knew that in fact Cooper *had* brought drugs onto company premises, in violation of Louisiana law and of a clearly-stated company rule. The public policy involved today is the same as that we relied on in *Amalgamated Meat Cutters:* one against the operation of dangerous machinery by persons under the influence of drugs or alcohol. Gazing at the trees, and oblivious of the forest, the arbitrator has entered an award that is plainly contrary to serious and well-founded public policy.

Such an award overrides the employer's attempt to protect the safety of its employees, including Cooper, in the name of safe-guarding Cooper's abstract procedural rights against a determination by the employer that the arbitrator knew was in fact true: that Cooper *did* bring marijuana onto his employer's premises. Indeed, even had the arbitrator not known of that fact at the time he entered his award, it is doubtful that the award should be enforced today in light of what is now known.

The judgment of the district court declining to do so is

AFFIRMED.

TATE, Circuit Judge, dissenting.

I respectfully dissent. Despite the brilliant caricature by the majority of the lay arbitrator's decision, the arbitrator's opinion squarely decides the only arbitral issue presented—whether Cooper, the discharged employee, had been wrongfully discharged for sitting in a car in which *another* employee was smoking marijuana, for the alleged violation of a rule that prohibited the employee himself from bringing or consuming marijuana on the plant premises—and squarely finds that Cooper himself had not violated the company rule.

Essentially questioning these arbitral findings, the majority nevertheless finds it to be against public policy to enforce this arbitral award. In support of this holding, the majority not only relies upon its disagreement with the arbitrator's reasoning, but it also relies upon the circumstance that a non-usable trace of marijuana had been found on a scale in the employer's car (for which no criminal charges had ever been filed)—a fact unkown to the employer at the time of the discharge, and one which the arbitrator found to be inadmissible as post-hoc jusitfication for the discharge that was based on another cause (aside from the issue of whether a non-usable trace of marijuana (verifiable as such only by microscopic or chemical analysis) in an employee's car constituted a violation of the company rule against bringing marijuana on the premises).

In their zeal to correct what the majority feels is a mistaken and misreasoned arbitration decision, my conscientious brethren of the majority, I fear, have (for reasons to be stated in parts I and II below) ignored controlling principles of the extremely limited permissible judicial review of such awards, and the extremely limited circumstances in which courts may deny enforcement of them. Absorption into the federal courts of greater power to review arbitration awards flouts the national policy favoring contractual resolution of disputes between

management and employees and disfavoring detailed judicial monitoring of dispute-resolution under arbitration agreements.

The brilliant and plausible majority opinion does not discuss the governing principles. Perhaps too lengthily, therefore, I will attempt to set them forth and to state how, in my view, the majority erred in failing to apply them in this case.

I.

Under settled principles by which judicial review of arbitration awards is "sharply circumscribed", *Local Union 59, International Brotherhood of Electrical Workers v. Green Corporation*, 725 F.2d 264, 268 (5th Cir. 1984), we cannot question (a) the arbitrator's factual evaluation of the evidence before him as not proving that Cooper possessed or used marijuana on the plant premises, (b) the arbitrator's interpretation of the contractual provision as not providing grounds for discharge if Cooper was in a vehicle where someone else was smoking marijuana, or (c) the arbitrator's procedural ruling that evidence unknown to the employer at the time of the discharge, but subsequently discovered by him, was not probative of the issue before the arbitrator as to whether at the time of the discharge the employer had a contractually valid cause to discharge Cooper. *Id.*, citing and quoting from the *Steelworker's Trilogy: United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); *United Steelworkers of America v. Warrier & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960).

These decisions hold that courts may not review an arbitrator's factual findings or merit determinations and that courts must enforce an arbitrator's award unless "[1] the dispute was not 'arguably arbitrable,' [2] . . .

the arbitral decision did not draw its essence from the collective bargaining agreement, or [3] . . . enforcement of the award by the court would violate public policy." *Amalgamated Meat Cutters and Butcher Workmen of North America AFL-CIO, Local Union 540 v. Great Western Food Company*, 712 F.2d 122, 123-24 (5th Cir. 1983) (citations omitted).

Thus, whether we are inclined to agree with the arbitrator's rulings or whether, instead, we think they are strained, is immaterial for purposes of judicial review. For these purposes, the arbitrator's factual finding is conclusive on the courts that Cooper did not possess or use marijuana on the plant premises, or bring it onto them.

II.

In its refusal to enforce the arbitrator's award, the district court did not disregard these principles. Rather, it refused to afford judicial enforcement of the arbitrator's award on the ground that its enforcement would be contrary to public policy, a holding affirmed by the majority. In so doing, the district court relied only upon the evidence that the arbitrator had refused to consider: that in Cooper's car in the plant's parking lot had been found the brown plastic case containing gleanings determined, on laboratory analysis (eight months later) to be marijuana. The district court concluded that this possession of marijuana not only constituted a violation of criminal law but also of "the company's rule barring introduction of intoxicants into the work place—a rule that is designed to effectuate the public policy against unsafe operation of heavy equipment by a worker whose judgment has been impaired by intoxicating substances."

Had the evidence in the arbitration proceeding clearly shown possession of usable marijuana or its use on the plant premises, the district court's and the majority's characterization of public policy reasons for non-enforcement of the award would be persuasive. However,

although undoubtedly a public policy reason supports non-use of marijuana (legally prohibited), no public policy authority is cited to us that an employee who uses marijuana or alcohol in his off-duty hours is unemployable or is without more subject to discharge for such non-employment-related use; however condemnable we might feel is such off-duty conduct by the employee. *Cf., e.g., Johns-Mansville Sales Corporation v. International Association of Machinists, Local Lodge 1609*, 621 F.2d 756 (5th Cir. 1980) (enforcing arbitrator's award that order-[ed] reinstatement of employees discharged for smoking on company property, despite rejected public policy argument that smoking increases health hazards in the work environment).

In *W.R. Grace and Company v. Local Union 759, International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America*, 461 U.S. 757, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983), the Supreme Court ordered enforcement of an arbitrator's decision, rejecting strong public policy arguments that to enforce the award would penalize the employer for its prior compliance with an earlier district court judgment (which subsequently had been reversed on appeal). The Court agreed that "a court may not enforce a collective bargaining agreement that is contrary to public policy" and that "[f]f the contract as interpreted by [the arbitrator] violates some explicit public policy, we are obliged to refrain from enforcing it." 461 U.S. at 766, 103 S.Ct. at 2183. In rejecting a public-policy-based denial of enforcement, the Court stated that, for public policy reasons to justify the judiciary to deny enforcement of an arbitration, the public policy "must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal principles and not from general considerations of supposed public interests.'" *Id.*

In finding in the present case that the public policy exception justified denial of judicial enforcement of the

arbitrator's award, the district court (as does the majority) principally relied upon *Amalgamated Meat Cutters, supra*, in which we noted that "[a] court should exercise extreme caution before declaring that an arbitral award violates public policy," 712 F.2d at 124, but nevertheless denied enforceemnt of "the arbitrator's award in this case, an award which compels the reinstatement to driving duties of a truck driver who admittedly drank while on duty," on the ground that enforcement would violate the well defined public policy "of preventing people from drinking and driving," 712 F.2d at 125.

In *Amalgamated Meat Cutters*, the arbitrator had specifically found that the discharged truck driver (involved in an accident in which his eighteen-wheel rig had overturned) had been drinking on the trip while driving his truck at work. (The arbitrator had nevertheless ordered reinstatement, on the ground that the employer had failed to disprove that a steering mechanism failure, rather than the driver's drinking, had caused the accident.) Distinguishably from the case now before us, however, in *Amalgamated Meat Cutters* the arbitrator had specifically found that the truck driver *on the job* engaged in hazard-creating conduct in violation of public policy (although nevertheless, on technical reasons, the arbitrator had ordered reinstatement).

In the present case, the enforcement of the arbitrator's award would not, under the principles of extremely limited judicial intervention with regard to arbitration awards, violate the public policy "against unsafe operation of heavy equipment by workers whose judgment had been impaired by intoxicating substances," relied upon by the district court. The evidence of marijuana traces found in Cooper's car does not establish either that Cooper used marijuana while performing work for Misco or that his judgment during work was impaired by intoxicating substances. The arbitrator found, moreover, that Cooper neither used nor possessed, nor was under the influence

of, marijuana at work. And the traces found in Cooper's car, even if considered by the arbitrator, would not, without more, lead to a contrary result, any more than an empty beer can in an employer's car would prove that he had been drinking on the work premises rather than elsewhere.

Amalgamated Meat Cutters, supra, is thus clearly distinguishable. The discharged employee there was actually consuming liquor while performing his job as a truck driver. Reinstatement would therefore have violated the public policy against drinking while driving. In this case, however, even though possession of marijuana violates *a* public policy, *see* La. Rev. Stat. Ann. 40:966(D), we cannot say that reinstatement of an employee in whose car were found non-employment-related traces of marijuana would violate any "well defined and dominant" public policy against using or being under the influence of marijuana *while at work.*

Conclusion

For the reasons assigned, therefore, I respectfully dissent. In violation of settled principles limiting judicial intervention in employment-dispute resolution through arbitration, the majority errs in refusing to accept the facts of non-violation found by the arbitrator, simply because it disagrees with the arbitrator's reasoning, and in refusing to enforce the arbitral award based upon purely rhetorical reasons of public policy beyond the facts actually found in the arbitration record.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-4727

MISCO, INC.,
Plaintiff-Appellee,
versus

UNITED PAPERWORKERS INTERNATIONAL UNION,
AFL-CIO and QUACHITA LOCAL 654,
Defendants-Appellants.

Appeal from the United States District Court for the
Western District of Louisiana

ON SUGGESTION FOR REHEARING EN BANC
(JUNE 3, 1986)

Before GEE, TATE and HIGGINBOTHAM, Circuit Judges

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing

en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

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ENTERED FOR THE COURT:

/s/ Thomas A. Gee
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

Civil Action No. 83-2904

MISCO, INC.

versus

UNITED PAPERWORKERS INTERNATIONAL UNION,
AFL-CIO, and its QUACHITA LOCAL 654

MEMORANDUM RULING

(Filed Oct. 3, 1984)

Not content with the arbitrator's ruling, plaintiff now seeks to have the award of the arbitrator vacated. The parties agree that the court's federal question jurisdiction is properly founded upon the Labor Management Relations Act, 29 U.S.C. § 185(a). In responding to the complaint, defendant counterclaimed, asking the court to enter a judgment enforcing the arbitration award and assessing attorney's fees and costs against plaintiff for acting unreasonably and in bad faith in refusing to abide by the award of the arbitrator.

Relying on the factual record created by the arbitrator's opinion, the parties have filed cross motions for summary judgment. For the reasons set forth below, the Misco motion for summary judgment is GRANTED.

The case *sub judice* had its origin in an incident which occurred on January 21, 1983. On that date, a Misco employee, Isiah Cooper (Grievant), was arrested, while at work, for possession of marijuana. At all pertinent times, Grievant was a member of defendant's Union. This incident led to Grievant's discharge on February 7, 1983. The grievance was processed through all requisite administrative steps and was ultimately submitted to an arbitrator. A hearing was held before the arbitrator on September 26, 1983. The arbitrator then issued a 33-page opinion on October 31, 1983. In that opinion, the arbitrator found that the employer lacked just cause to dismiss Grievant under the terms of a collective bargaining agreement in force at the time of plaintiff's discharge.

Plaintiff now moves to have the arbitrator's order vacated, arguing that the arbitrator exceeded his authority, ignored highly probative facts, and ruled in violation of public policy. Defendant, on the other hand, contends that the traditional deference accorded to arbitration awards should require the court to honor that award.

The relevant facts, as found by the arbitrator, are as follows: Misco operates a paper converting facility. Hazardous industrial equipment is crucial to the operation of this facility. Grievant was employed as a slitter/rewinder operator. This machine is considered particularly hazardous because it features sharp edges required to cut rolling coils of paper. The danger inherent in operation of this machine has resulted in 10 to 15 accidents over the past four years at the Misco facilities. The company contends that the use of intoxicants impedes the judgment and coordination of hazardous equipment operators, thus increasing the likelihood of accidents. For this reason, the company has a strong policy which prohibits the possession or use of drugs or alcohol on company premises. The company has taken repeated steps to ensure its employees understand the necessity for

the policy. Under the collective bargaining agreement, one of the reasons for discharge of an employee is violation of Rule ii(1), which states:

> Bringing intoxicants, narcotics or controlled substances into, or consuming intoxicants, narcotics or controlled substances in the plant, or on plant premises. Reporting for duty under the influence of intoxicants, narcotics or controlled substances.

In the months preceding January 1983, the company had experienced difficulty with violations of this rule. Specifically, Misco's personnel had found empty beer cans, whiskey bottles, and the remains of marijuana cigarettes on company premises.

Apparently, the company felt that it was having serious production problems and drug and alcohol problems on the second shift, the one on which Grievant worked. Whether justified or not, management believed that the two problems were intricately related. To combat the problem with the use of intoxicants, the company held employee meetings stressing the prohibition against use or possession of drugs or alcohol on company premises. In addition, management made spot checks on the second shift to find violators, and the production manager lived in a trailer on the plant premises during the week in an effort to observe offenders violating the rule. On two occasions prior to January 1983, Grievant had been reprimanded for producing paper rolls not sized according to specification.

On the night of January 21, 1983, Monroe police, acting pursuant to a search warrant, searched Grievant's home. The officers found two and a half bags of marijuana, five marijuana cigarettes, weight scales and marijuana cigarette paper. Shortly thereafter, Officer Frank Bougere was sent to an area near Misco's premises to keep Grievant's car under surveillance in the event Grievant attempted to flee. Bougere did not know Grievant, and

had been told that he was a large black man. Bougere located Grievant's car from a license number given to him. Bougere stationed himself approximately 100 yards from Grievant's car, a 1973 Grand Prix. Using binoculars, Bougere observed the following events:

At approximately 6:30 p.m., the officer saw a group of men leave the plant and walk to Grievant's car. Bougere later learned that one of the men was the Grievant. Upon reaching the Grand Prix, two of the men entered the car and remained for a few moments. The group then proceeded from the Grand Prix to a white Cutlass. Three of the men, one of them Grievant, got into the Cutlass and remained until other police officers arrived. At this point, the other two men besides Grievant left the car and went back to the plant. Grievant then was arrested for possession of marijuana found in his apartment. After his arrest, one of the officers located a lit marijuana cigarette in the ashtray of the car. During the company's investigation of this incident, Grievant denied having been in the car or ever having used or possessed marijuana on company premises.

Shortly after his arrest, Grievant signed a consent to search form authorizing the Monroe police officers to conduct a search of his car. The search revealed a brown plastic weight case which contained shreds of vegetable matter later identified as marijuana. Company officials did not become aware of the discovery of marijuana in Grievant's car until shortly before the arbitration proceeding.

On April 12, 1983, Grievant entered a plea of guilty to a charge of possession of marijuana in the Fourth Judicial District Court, Ouachita Parish, Louisiana. As a result of this incident, the company conducted an investigation which ultimately led to Grievant's discharge in February of 1983.

As a matter of federal policy, arbitration is to be favored over judicial resolution of disputes similar to the one in this case. *United Steelworkers v. American Manufacturing Company*, 363 U.S. 574, 80 S.Ct. 1343, 4 L.Ed. 2d 1403 (1960).

In certain limited circumstances, judicial enforcement of the arbitrator's award is not required. Specifically, an award that is contrary to law or public policy need not be enforced. *Sea Land Service v. International Longshoremen's Association*, 625 F.2d 38 (5th Cir. 1980); *Johns-Manville Sales v. International Association of Machinists*, 621 F.2d 726 (5th Cir. 1980); *Amalgamated Meatcutters* v. *Great Western Food Co.*, 712 F.2d 122 (5th Cir. 1983). Before rejecting an arbitrator's award on the basis of policy considerations, the Supreme Court has explained that:

> Such a public policy, however, must be well defined and dominant, and is to be ascertained by 'reference to the laws and legal precedent and not from general considerations of supposed public interest.'

W. R. Grace & Co. v. Locan Union 759, 103 S.Ct. 2177 (1983), *citing Muschany v. United States*, 324 U.S. 49, 66, 65 S.Ct. 442, 451, 89 L.Ed. 744 (1945); *Amalgamated Meatcutters, supra.*

In the present case, the Union relied most heavily on the general principle that arbitrator's awards should be upheld as a matter of general federal policy. The core of plaintiff's argument is, however, that this preferred federal policy should not override matters of general public policy which are abridged by an arbitrator's award. The court finds *Amalgamated Meatcutters* to be the most persuasive in disposition of this case. In that case, defendant discharged its employee after he wrecked the company's tractor-trailer rig. The employee contended the discharge was without just cause, and pursued the matter through arbitration. The arbitrator ruled that

the employee should be reinstated. At the arbitration hearing, the arbitrator found that the police officer investigating the accident smelled liquor on the employee's breath; moreover, employee admitted to the police officer he had been drinking during his last rest stop. The district court enforced the arbitator's award and the Fifth Circuit reversed. The basis of the appellate court's ruling was that the arbitrator's award violated "the public policy of preventing people from drinking and driving. . . ." *Amalgamated Meatcutters, supra*, at 125. The court specifically found that the policy was sufficiently well defined and definite because the policy against drunk driving is "embodied in the case law, the applicable regulations, statutory law, and pure common sense. . . ." *Id.* In reaching this decision, the court noted:

> In a nation where motorists practically live on the highways, no citation of authority is required to establish that an arbitration award ordering a company to reinstate an over the road truck driver caught drinking on duty violates public policy. Alcohol impairs a person's coordination, and inhibits his ability to reason rationally. Ingestion of alcohol slows the reflexes. It induces drowsiness. It slows response time to external stimuli. It dulls the senses. In recognition of alcohol's undisputedly debilitating characteristics, every state in the union prohibits driving while under its influence. A driver who imbibes the spirits endangers not only his own life, but the health and safety of all other drivers. These considerations are convincing enough with respect to drivers of automobiles. They become even more compelling when the driver is regularly employed to course the highways in a massive tractor-trailer rig.

Id. at 124.

The same can be said of the intoxicating effects of marijuana. Similarly, an operator of a dangerous piece

of industrial equipment can be said to present the same danger to himself and to his co-employees as an operator of a tractor-trailer rig does to fellow motorists. The Union argues that *Amalgamated Meatcutters* can be distinguished from the instant case in that the truck driving employee admitted having consumed alcohol before the wreck. It is true that Cooper has consistently denied using or bringing marijuana onto Misco's premises; nonetheless, the arbitrator's findings of fact clearly indicate that the brown plastic case found in Cooper's car contained marijuana. Notwithstanding this fact, and the inferences to be drawn from it, the arbitrator still found that Cooper should be reinstated. It is true that the company did not know of the officer's discovery until shortly before arbitration began, but the real issue in this case is not when the company learned of the incident, but whether reinstatement is appropriate at this point.

Aside from the general policy considerations explained above and which are embodied in the company's rules, marijuana possession is specifically prohibited by law. La. R.S. 40:966(D). By being in possession of marijuana on company premises, Cooper violated clearly established law as well as the company's rule barring introduction of intoxicants into the work place—a rule that is designed to effectuate the public policy against unsafe operation of heavy equipment by workers whose judgment has been impaired by intoxicating substances. Moreover, *Amalgamated Meatcutters, supra,* serves as ample legal precedent to support the conclusion that well-defined, clear public policy exists, which favors prevention of occupational accidents through the prohibition of the use of debilitating substances in the work place. For this reason, the court concludes that the claims of the Union must be REJECTED, and its motion for summary judgment will be DENIED. Conversely, the motion for summary judgment filed on behalf of Misco will be GRANTED and the award of the arbitrator will be set aside.

An Order consistent with the terms of this Memorandum Ruling shall issue herewith.

THUS DONE AND SIGNED at Shreveport, Louisiana, this 2nd day of October, 1984.

/s/ Tom Stagg
TOM STAGG
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
WESTERN DIVISION

Civil Action No. 83-2904

MISCO, INC.

versus

UNITED PAPERWORKERS INTERNATIONAL UNION,
AFL-CIO, and its OUACHITA LOCAL 654

ORDER

[Filed Oct. 3, 1984]

Based upon the reasons expressed in the foregoing Memorandum Ruling,

IT IS ORDERED that the motion for summary judgment filed on behalf of the defendant is hereby DENIED.

IT IS FURTHER ORDERED that the motion for summary judgment filed on behalf of Misco, Inc. is hereby GRANTED, and the award of the arbitrator is hereby SET ASIDE.

DATED AND SIGNED at Shreveport, Louisiana, this 2d day of October, 1984.

/s/ Tom Stagg
TOM STAGG
Chief Judge

APPENDIX D

Reference: 83K/16718

IN THE MATTER OF ARBITRATION BETWEEN

MISCO, INC.
MONROE, LA.

AND

UNITED PAPERWORKERS INTERNATIONAL UNION
LOCAL NO. 654
W. MONROE, LA.

DISCHARGE: ISIAH COOPER

Hearing was held in the Conference Room of Company's Counsel, tenth floor, Ouachita National Bank Building, Monroe, LA on Monday, September 26, 1983. The parties gave their permission for the Hearing to be tape recorded and used for educational purposes. The Arbitrator informed the parties that he is a Creek American Indian. The witnesses were sworn individually just prior to testifying. The Grievant was represented by his own attorney who assisted the Union International Representative who presented the Union's case. Prior to the close of the oral portion of the Hearing all parties, including the Grievant, were given an opportunity to add anything further they so desired. The Grievant took advantage of this opportunity. The Grievant was further asked if he felt that he had received a full and fair Hearing and if he felt the Union had properly represented him. He answered in the affirmative to both questions. The Hearing was considered closed upon receipt of the

post-Hearing briefs by the Arbitrator, namely October 21, 1983.

ARBITRATOR: Milden J. Fox, Jr., P.E., Ph.D., Professor of Industrial Engineering, selected by the parties under the procedures of the FMCS.

* * * *

STIPULATIONS

The parties stipulated the following:

1. The grievance is properly before the Arbitrator and he has the power under the Contract to make an Award that is final and binding on the parties.
2. The two week requirement that the Arbitrator has to make the Award is waived in favor of the Arbitrator getting the Award out as soon as possible.
3. The Company did not know about the gleanings found in the Grievant's car by Detective Toney on 1-21-83 until 9-21-83.

STATEMENT OF THE ISSUE

The parties agreed upon the following Statement of the Issue:

> Did the Company have just cause to discharge the Grievant under Rule II.1? If not, what if any should be the remedy?

GRIEVANCE

The grievance (JE-2A) dated 2-7-83 states the following:

> *Contract Reference*: Work Rules
>
> *Nature of Grievance*: Unjustified Termination
>
> *Settlement Desired*: Re-instate and make whole for all losses

The third step grievance procedure (JE-2B) states the following:

Meeting was held on Mon. 2/14/83 at 4:30 p.m. to establish proof as to the reason why Isiah Cooper was terminated. Present were Otha Pittman (sic), Isiah Cooper, Horace Curry, Fred Billhorn, Biff Meredith, Charles Covington and two police officers who arrested Cooper on company property on Fri. Jan. 21. Isiah Cooper violated company rules in being in a car with a lit marijuana cigarette. This was a direct violation of company rules as outlined in present work contract of having an illegal substance on company property is subject to immediate termination. Management was asked to provide sufficient evidence at this hearing and are satisfied that they did. The two police officers testified that Cooper got out of the car where they found the lit marijuana cigarette.

ss Charles Covington
Production Manager
2/14/83

CONTRACT

The Contract between the parties (JE-1) is effective from March 30, 1981 through March 30, 1984. The parts relied upon by the parties are as follows:

ARTICLE IV
MANAGEMENT RIGHTS RESERVED

1. Subject to the expressed provisions of this collective bargaining agreement, the Company reserves and retains, solely and exclusively, all its inherent rights to manage the business as such rights existed prior to the execution of this Agreement. *The Company shall have the full and exclusive* authority to determine and direct the policies, procedures and methods of operating its business. Without limiting the generality of the foregoing, the management rights not abridged by this Agreement include, but

are not confined to, the right to determine and from time to time, to redetermine the number, types and locations of its operations, and the methods, equipment, and processes to be employed; to discontinue or automate methods, equipment, process or operations, the right to determine the qualifications for new employees and to select its employees; to determine standards of production and the size and composition of its work force; to determine production and shipping schedules and methods of shipping and production; to determine the number and type of equipment, machinery, materials and supplies to be used or operated and the products to be manufactured, processed or sold or the services to be rendered or supplied; to hire, promote, transfer and assign employees to work; to reprimand, discharge or otherwise discipline employees; to determine job content and the amount and type of work needed; to determine and make the assignments of work; to schedule the hours and days and breaks and number of breaks and to determine the number of hours and days to be worked in each job in each shift; to discontinue or to transfer, assign or subcontract all or any part of its business operations to be performed by any outside person, firm or corporation whatsoever, selected by the Company in its sole discretion subject to the provisions of Paragraph 3 of this Article, to expand, reduce, alter, combine, transfer, assign or cease any job, job classification, department or operation; to determine the amount of supervision necessary; to control and regulate or discontinue the use of supplies, equipment, machinery and processes and any other property owned, used, leased, or possessed by the Company; to unilaterally establish, modify, and enforce the plant rules or regulations and/or disciplinary procedures, policies and practices; to introduce new, different, or improved methods, means and processes of transporta-

tion, production, maintenance, service and operation; and, otherwise, generally to manage the plant and direct the work force; the Company's failure to exercise any function or right in any particular way shall not be deemed a waiver of its rights to exercise such function or right, nor to preclude the Company from exercising the same, in some other way not in conflict with the express provisions of this Agreement.

2. The above enumerated rights of management are not all inclusive, but indicate the types of matters which belong to and are retained by the Company.

3. Except as specifically abridged, delegated, granted or modified by this Agreement, or by any supplementary agreements that may be made hereinafter, all of the rights, powers and authority of the employer existing prior to the signing of this Agreement are retained by the Company and remain exclusively and without limitation within the rights of management. It is understood however, that work customarily assigned to members of the bargaining unit shall only be contracted out in cases of emergencies or overflow conditions and that it is not intended that subcontracting of work shall result in the lay-off of employees within the bargaining unit.

4. Union stewards and local union officers employed by the Company are subject to the same discipline as any other employee covered by this agreement for violation of the Company's rules and regulations.

5. When a written reprimand or statement against an employee is to be entered in his disciplinary record, the Company will furnish him with a copy of the same and require him to sign that he has received it. Failure to acknowledge receipt of such statement shall constitute just cause for discharge. In arbitration cases reprimands shall not be con-

sidered cumulative if more than one (1) year apart, but all reprimands shall remain permanently in the employees file.

ARTICLE XI
MAINTENANCE OF DISCIPLINE

1. The Union agrees to cooperate with the Company in maintaining proper discipline and compliance with the plant rules and regulations. The Company shall retain the right to establish, maintain, enforce, rescind, amend or change rules and regulations regulating the discipline or discharge of employees and the procedures for issuance of reprimands and other forms of discipline. Plant rules will be posted and a copy sent to the local Union before posting. The Union may challenge any plant rule within fifteen (15) days after such posting, only on the basis of fairness and necessity of such plant rule, however, plant rules will be effective immediately upon posting and remain in effect until ruled on by grievance and arbitration procedures as to fairness and necessity.

2. The Union agrees to cooperate with the Company in maintaining and improving the quality of work, operating efficiency, safety and production in the Company's operations. Recognizing that the welfare of the employees and their opportunities to maintain and improve their livelihood depend upon the efficiency in the Company's operations, and consistent with the principle of a fair day's work for a fair day's pay, the Union hereby pledges for itself and all of its members that they will perform their work effectively and efficiently to the best of their ability, and that they will wear all items of safety clothing and equipment required by the Company. In order for the Company to maintain the highest

possible volume of production and quality of service, the Union will do all in its power to combat practices which impede or interfere with these objectives.

The Company Rules (or Work Rules) are JE-3. The rule involving the instant grievance is as follows:

CAUSES FOR DISCHARGE

II.

1. Bringing intoxicants, narcotics, or controlled substances into, or consuming intoxicants, narcotics or controlled substances in the plant, or on plant premises. Reporting for duty under the influence of intoxicants, narcotics, or controlled substances.

BACKGROUND

The instant case is between Misco, Inc. (hereinafter referred to as the Company or Management) and the United Paperworkers International Union AFL-CIO, Ouachita Local #654 (hereinafter referred to as the Union). The Company feels that certain background events and policies of the Company are important to the consideration of the instant case. The Company is in the paper converting industry. They take roll stock and finish it in sheets or circles for the packaging industry. Hazardous equipment and machinery is in use in the industry, such as the slitter-rewinder which the Grievant operated. Because of the hazardous nature of this type of equipment, the industry generally and the Company are rated with high premiums for workman's compensation insurance. The Grievant's machine in particular is considered to be hazardous because of the sharp edges used to cut rolling coils of paper. According to the Com-

pany's post-Hearing brief, there have been 10 to 15 accidents on the slitter-rewinder over the last 4 years, a record which very clearly demonstrates the hazardous nature of the slitter-rewinder.

According to the Company, the use of drugs or alcohol impair the judgment and coordination of operators of such hazardous equipment, creating a safety hazard to themselves and to other employees. Because of this, Management says it has taken a strong position against the possession or use of drugs or alcohol in the plant or on Company premises through the publication of rules, employee meetings, and other notices or bulletins to the employees.

The Company Rules (JE-3) have been in effect for 9 or 10 years. The rule involved in this proceeding, which is listed as one of the causes for discharge is Rule II. 1, hereinafter referred to as the Rule, which states as follows:

> Bringing intoxicants, narcotics, or controlled substances into, or consuming intoxicants, narcotics or controlled substances in the plant, or on plant premises. Reporting for duty under the influence of intoxicants, narcotics, or controlled substances.

According to the Company's post-Hearing brief, the employees have been fully aware of the Rule and it has been uniformly enforced and other employees have been discharged for violations of the Rule. At the Hearing the Company President testified that the Rule was enforced and that an employee had been discharged recently at the Greenville plant for violation of the Rule; however, no evidence was presented to support this testimony.

Prior to the events leading up the discharge in the instant case, the Company found evidence on the premises that drug or alcohol use could be taking place in violation of the Rule. The Company's testimony was that

the Company had found empty beer cans, whiskey bottles, and marijuana cigarette roaches on Company premises in the months prior to the Grievant's arrest on January 21, 1983. Additionally, Management received reports from Foremen that they had smelled smoke on the premises, but had never seen anyone smoking marijuana.

In an effort to stop the drug and alcohol use, an employee meeting was held in mid 1982 at which time employees were cautioned about the violations of the Rule prohibiting the possession or use of alcohol or drugs on the premises.

The Grievant worked on the night or second shift. There was uncontradicted testimony that the second shift had problems with production and quality that were not found on the first shift. Examples of production or quality problems were that the employees would cut paper with the wrong width or that wrong diameter cubes would be utilized. According to the Company's post-Hearing brief, these are typical problems of accuracy and fine judgment.

The Grievant, according to the Company, was having serious performance problems. On August 5, 1982 the Grievant was reprimanded and his pay was reduced to the 120 day rate for 20 working days as a disciplinary measure (CE-8). The reprimand stated that the Grievant had to learn to read and fix production orders correctly and that it was his responsibility to achieve the Company's production standards. The reprimand admonished the Grievant to "turn yourself around and mold yourself into the top-notch rewinder operator that you are capable of becoming."

On January 20, 1983, one day before his arrest, the Grievant received a written reprimand which put him on a 90-day probationary period, commencing January 13, 1983, for running five sets of material of the wrong width. The reprimand stated that "[D]uring this time

your work performance, attitude and productivity will be monitored very closely. Your continued employment with this Company is in your hand, as one more mistake such as this will result in your being removed from this machine permanently" (CE-9).

Thus, before the events of January 21, 1983 involving the Grievant's arrest for possession of marijuana at his home and his alleged possession on the Company parking lot, the Company felt it had a drug and alcohol problem on the night or second shift. The Company held employee meetings concerning the problem and called attention to the prohibitions of the Company rules against use or possession on Company premises. Further, Management officials made spot checks on the second shift in an effort to find offenders. During the week, the Production Manager lives in a trailer on the plant premises and frequently attempted to surprise employees in the act of violation of the Rule. Further, the second shift was evidencing problems of accuracy and production which the Company felt were attributable to the prohibited use of drugs or alcohol. More particularly, the Grievant had been reprimanded in 1982 and was placed on probation in January 1983, for 90 days because of the very type of accuracy problem that the Company felt might be attributable to the prohibited use of alcohol or drugs on the premises.

A warrant was obtained by the police to search the Grievant's house on Friday, January 21, 1983. McClanahan, Toney, other officers and a narcotics dog searched the Grievant's house and found 2½ bags of marijuana, five marijuana cigarettes, weight scales and marijuana cigarette paper. At the time of the house raid, Officer Frank Bougere was sent to the area of the Company to keep the Grievant's 1973 Grand Prix under surveillance, in the Company parking lot, so if the Grievant tried to get away during the house search, he could be detained until other officers arrived. About 5:30

p.m. Bougere drove through the Company parking lot and located the Grievant's car from the license number given him. Bougere did not know the Grievant on sight other than he was a large black man. After locating the Grievant's car, Bougere took a surveillance position direction across from the Company parking lot in an abandoned service station, some 100 yards from the Grievant's car. There are lights in the parking lot but no one that testified could remember if the lights were operating at the time. For example, the lights, according to the Company, were not working at the time of the arbitration Hearing. Bougere was using binoculars in his surveillance operation; but could not remember anything about them.

Around 6:30 p.m. Bougere saw some men come out the West door to the plant, the door that exits to the parking lot, turn to the right and walk towards the end of the lot where the Grievant's car was parked. This was some seven or more parking spaces from the door. Among the men walking alongisde the building was a large man he later identified as the Grievant. When the group got to the Grievant's car (it was backed into its parking space), according to Bougere at least two of the men got inside the car for a few minutes. At this point, Bougere thought the Grievant might possibly be getting ready to leave the plant so he notified the house raiding team of same. The men in the Grievant's car subsequently got out and walked back towards the plant door to a white 1975 Cutlass belonging to George Williams. According to Bougere, the white Cutlass was located about two car lengths from the Grievant's car. He did not recall seeing an identical black 1975 Cutlass backed into a parking space two spaces over from the white Cutlass as indicated by Union testimony. Also according to Union testimony, the white Cutlass was also backed into its parking space and the Grievant's car was two spaces over from the black Cutlass.

Officer Bougere continued watching the group of men walk back towards the plant door. When they got to the white Cutlass, he said that three of them entered the Cutlass with the man, later identified as the Grievant, getting in the back seat. The Cutlass was a 2-door model. With the position that Bougere testified he had, the location of the white Cutlass in the parking lot, and the way the car was backed into the parking slot, Officer Bougere was looking directly into the front windshield of the white Cutlass. It should be noted that Officer Bougere never testified that at any time during his surveillance did he see anyone light a cigarette, in particular, not one of the three men seated in the white Cutlass. Nor did he testify to anyone passing a cigarette to another person. The three men remained in the white Cutlass until Bougere and the other officers drove up. There were a total of six officers involved with the "bust."

When the police drove up some time around 6:30 p.m. the men in the white Cutlass got out of the car and two of them went back into the plant. For some reason the Grievant did not do so. Officer McClanahan, who appeared to be in charge of the operation, did not know the Grievant on sight, so Bougere went into the plant to see if he could locate the Grievant, which he failed to do and consequently returned to the area of the white Cutlass. When Bougere returned to the parking lot the Grievant had been apprehended and Bougere saw the lit marijuana cigarette in the right hand door of the white Cutlass' ashtray. The white Cutlass was searched but no marijuana, other than the lit cigarette, was found. One of the three police officers who testified said that another officer found a bottle of liquor in the white Cutlass but nothing was further said or done about this find although having liquor on Company property is also a violation of the Rule. Both Bougere and McClanahan testified they smelled marijuana aroma (smoke) in the white Cutlass.

According to Al Calloway, he was setting in the black Cutlass (his car) and the police questioned him as to the car ownership and then did not have anything further to do with him. The police did not mention even talking to Calloway.

The Grievant signed a consent for the police to search his car. Officer Toney searched the Grievant's car and found a plastic scales case with gleanings of alleged marijuana. Toney sealed these items in a bag and they were placed in the Metro Narcotics Evidence Room where it remained until 9/21-83. Toney did not bother telling anyone about the gleaning of alleged marijuana, but they were contained in his report of the incident. These items were found when the Company Attorney and one of his associates went to police headquarters to go over the case in preparation for the instant Hearing. In the process of going through the Grievant's police file (with the proper approval) with the two Company Attornies, Officer Toney found his record of the gleanings found in the Grievant's car on January 21, 1983. The gleanings were submitted to the North Louisiana Criminalistics Laboratory and a report was received dated 9/21/83 (CE-5) indicating that the substance was in fact marijuana. The cigarette found in the white Cutlass was also submitted to the same laboratory and a report was received on 2/4/83 (CE-4) indicating that the cigarette was marijuana.

The Grievant, along with some other fellow Company employees, claimed that they were standing behind the black Cutlass between the white Cutlass and the Grievan't car when the police made their raid on the Company parking lot. Calloway also testified that the Grievant and Bobby Brown were standing behind his black Cutlass when the bust went down.

The Company allegedly knew nothing about the arrest of the Grievant on January 21, 1983 which seems rather strange in that the night Foreman knew that the bust was going down, but he specifically stayed away from

the activity. In fact, the man was not even at the arbitration Hearing to testify as to what he knew about the situation. Al Calloway testified that he went back into the plant after his break was over and told the night Foreman, Jerry Ewing, about the bust in the parking lot. Ewing just walked off and never went outside to find out what was going on. The Plant Manager also testified that Ewing told him the bust went down during the 6:30 to 7:00 p.m. break and he, Ewing, was back in the plant doing some paper work, loading a truck, or something and did not know anything was transpiring until the police officer(s) came into the plant to apprehend George Williams, the owner of the white Cutlass. It was shown that Williams was across the street at the 7-11 convenience store during the bust.

According to the Production Manager, he heard of the parking lot bust on Sunday, January 23, 1983. On Monday he had a conference with the Grievant. The Grievant told the Production Manager that he had been arrested for possession of marijuana at his home. Furthermore, that he, the Grievant, had never possessed marijuana or used it on the Company premises. The Production Manager did not pursue the matter further at the time.

Misco's President, Fred Billhorn, first learned on January 27, 1983 that there had been a marijuana cigarette in the car in which the Grievant was sitting on January 21st. Billhorn received word that Officer McClanahan wanted him to get in touch with him about a drug problem at the plant. Billhorn testified that he telephoned McClanahan on January 27th and was advised about the marijuana cigarette found in the car with the Grievant and the Grievant's refusal to tell who the other two employees were that the police were unable or did not bother to apprehend. The police admitted that at the time of the bust they were only interested in the Grievant and not anyone else. One officer even testified he had never arrested anyone for smoking marijuana. The officers

later made a sweep of the plant trying to identify the other two men in the white Cutlass. They saw some individuals who might have been the two, but they could not make a positive identification.

As a result of this conversation with McClanahan, Billhorn launched an investigation of the situation. Covington was out of town on January 27th, but when Covington telephoned the plant on January 28th, Billhorn advised him of McClanahan's revelation that the Grievant was in a car on the parking lot with two other employees and a lit marijuana cigarette. When Covington returned to Monroe on the afternoon of January 28, 1983, the management team met and they decided to have a meeting with the Grievant and some other employees they thought might have been involved.

On January 31, 1983, according to Covington, Covington and Billhorn met with the Grievant and fellow employees Al Calloway, Bobby Brown and George Williams. The employees were advised that there was abuse of Rule three with the lit marijuana cigarette in the white Cutlass and that the Company was going to get to the bottom of it and the guilty parties had best go ahead and resign. This was the second meeting with the Grievant about the events of January 21, 1983.

Later that same day, Billhorn and Covington met with all of the employees and warned them about the problem that had been reported to the Company. The employees were reminded about the existence of the Company policy of immediate discharge for employees who are under the influence of or who possessed illegal drugs or alcohol on the Company premises.

After the general employee meeting on January 31, 1983, Billhorn and Covington had a third interview with the Grievant about the situation. They went over the allegations made by Officer McClanahan, but the Grievant again assured the Company representatives that he had

not possessed or used marijuana on the premises. He denied being in the white Cutlass and would not identify the other two men in the Cutlass.

Around February 1 or 2, Billhorn began trying to reach local Union President Otha Pittman. Pittman and Billhorn discussed the situation and Pittman began his own investigation. After investigating, Pittman contacted Billhorn and advised him that the Grievant had denied the allegations against him.

The decision to terminate was made on Friday, February 4, 1983, by Management after a review of all the facts including the Grievant's prior work record and the investigation. The Grievant was actually terminated on Monday, February 7, 1983, on which day he filed the grievance in evidence as JE-2A.

On April 12, 1983, in the Fourth District Court, Parish of Ouachita, State of Louisiana Court of Honorable Lemmie D. Hightower, Judge, #M:50489, the Grievant pled guilty to possession of Marijuana (CE-1). On April 14, 1983 in Judge Hightower's Court (# M:50489) the Grievant received ". . . a fine of $450.00 and costs, default 60 days (CE-2)." On February 9, 1983, before the above Judge Hightower, Mr. Robert Johnson, Assistant District Attorney for Ouachita Parish, Monroe, Louisiana, made the following statement:

> Your Honor, that . . . we declined prosecution with respect to a marijuana cigarette that was found in his constructive possession, but we are still evaluating the file to determine whether or not we're going to charge the other marijuana that was seized pursuant to a search warrant of Mr. Cooper's home.

On 2/4/83 the Grievant was denied unemployment compensation by the State of Louisiana. On 5/5/83 the disqualification for benefits was reversed on appeal (docket M 465 AT 83) by Lindle Stewart, Appeals Referee. On 8/5/83 the Decision of the Board of Review denied the

Company's appeal of the reversal of the 5/5/83 disqualification of the Grievant for unemployment benefits. The Board denied the Company's appeal based on the failure of the Company to file its appeal on time (timelineness). The Company maintained that they mailed the appeal timely, but the Board lost the appeal. The Board stated in UE-4 that the appeal from the Company was received on June 16, 1983 but that the Company's appeal rights expired May 20, 1983.

Pursuant to the grievance submitted by the Grievant (JE-2A) on 2/7/83, the instant Hearing has resulted.

POSITION OF THE PARTIES

Company:

The Company submits that just cause under any standard of proof was established and that its discharge of the Grievant should be sustained. In the alternative, if the Arbitrator should not so find, the Company strongly submits that the Grievant should not be reinstated or given backpay or any other remedy in this proceeding because of the subsequently discovered evidence clearly demonstrates his unfitness for employment, as related at the arbitration Hearing.

Union:

It is the Union's position that the action taken by the Company was unreasonable in light of the facts in the case.

1. The Grievant was never charged in connection with a marijuana cigarettee found on Company property in a white Cutlass Oldsmobile.
2. The Company, although given opportunity, did not seek corroborative proof.
3. There was no witness who observed the Grievant smoking a marijuana cigarette.

4. The Company failed to offer substantive proof to State of Louisiana Security Tribunal.

Basically, the Company acted prematurely on advice of Monroe Police Department who dropped their case like an egg on the Company's head. The Company should have deferred judgement on discharge until the State decided if enough evidence warranted moving forward with the case against the Grievant.

The Grievant should be reinstated and made whole for all losses.

OPINION

In the area of discharge or discipline, it is incumbent upon the employer to prove guilt of wrong doing and particulary so when the Contract requires "cause" or "just cause" for the discharge. Furthermore, the degree of proof in an ordinary discharge or discipline arbitration case is generally the "preponderance of evidence" rule. "Proof beyond a reasonable doubt" is normally required only in those disciplinary cases where an employee is charged with acts of moral turpitude.

The employee's past record is often a factor in the determination of the proper penalty for the offense. It is further a recognized principle in arbitration that there must be reasonable rules, uniformly applied, and adequately disseminated. "Just cause" requires that employees be informed of a rule, the infraction of which may result in discharge.

When Management fails to post Plant rules, its freedom of action may be more restricted than had the rules been posted. As a result, Management is burdened with a greater necessity to prove the absence of discrimination in the discipline of an employee. This is especially true should Management opt to apply a rule that would invoke discharge as the penalty for violation. Under these conditions there should be no doubt in the minds of the employees as to the existence and nature of the

rule. Furthermore, failure to conduct a fair investigation or interrogate the Grievant before reaching a decision to terminate him violates the principal of industrial due process.

Evidence concerning the giving of warnings of unsatisfactory conduct prior to discharge is germane in deciding if the penalty is justified. When an employee continues prohibited conduct after having been warned, the fact that he was warned will stand against him.

In the area of burden of proof or burden of the affirmative, the Company has the initial burden to justify its action. Once this burden has been shouldered, the burden of the affirmative passes to the Union which must, if it is to prevail, etiher successfully refute the Company's case of establishing "just cause" or else prove mitigating circumstances.

Unions benefit from due process by being able to protect and serve their members. Management also benefits from due process in at least four ways. The first is that in making and enforcing disciplinary policy, its supervisors or managers have to think realistically about the types of behavior that truly harm the Company's operations, and the types that do not. Second, supervisors answerable for their acts, have a stake in getting workers to participate in setting standards of behavior in social interaction at the workplace. Third, the possible monitoring of the Contract with the grievance procedure forces supervision to appraise the thrust and impact of Union demands and weigh the implications of the Company's acts and policies. Fourth, there is created the necessity of a complete record that will show and support the Company's action(s) in the event an impartial third party is called upon to hear the case and make a final and binding decision.

The normal criteria for a discharge or discipline to meet the usual "just cause" are (58 LA 599 and 64 LA

110), which are based on the questions set forth by Arbitrator Daugherty in an appendix to *Enterprise Wire Co.*, (46LA 359). The criteria is as follows:

1. The employee must be forewarned.
2. Employer's position with respect to employee's conduct was reasonable.
3. Employer investigated before discharge.
4. Investigation was fair.
5. Substantial evidence supports the charge against the employee.
6. There was no discrimination.
7. The degree of discipline was reasonably related to the nature of the offense and the employee's past record.

In arriving at his opinion this Arbitrator has listened to the tapes made of the Hearing, read the post-Hearing briefs, read all of the exhibits, and checked all of the citations listed in the briefs. The instant case will now be analyzed in light of the seven criteria and the information obtained from the above sources.

1. The Employee Must Be Forewarned

The Rule in question leaves no doubt as to the results of bringing narcotics to the plant, consuming narcotics at the plant, or reporting for duty under the influence of narcotics. There are specified as "Causes for Discharge in Work Rule II.1. which has been referred to throughout this Award as the Rule. The Company had testimony that it had held a meeting of the employees in 1982 and warned them of the Rule plus the Company's concern for the enforcement of the rule, namely the safety of employees. However, the Company did not say whether or not the Grievant was in attendance at the meeting. He may have been or he may not have been

in attendance. Throughout the Hearing and all of the meetings prior to and following the Grievant's discharge he maintained (1) that he had not smoked marijuana on Company property, and (2) that he had never brought any marijuana on Company property. Such vehement denial by the Grievant at all the meetings, all steps of the grievance procedure, and the arbitration Hearing can only lead the Arbitrator to the conclusion that the Grievant knew about the Rule and hence he was warned.

2. Employer's Position With Respect to Employee's Conduct Was Reasonable

Assuming that the Company proves that the Grievant violated the Rule by being in a car with a lit marijuana cigarette, namely possessing an illegal substance on Company property and furthermore that said conduct was subject to immediate discharge, then the Employer's position with respect to the employee's conduct was reasonable. However, it should be pointed out by the Arbitrator that Section II of the Company Rules (JE-3) does not say anything about immediate discharge. Section II only lists "Causes for Discharge." As an example, reading on duty except where required in line of duty is listed under Section II. Is this a cause for immediate discharge? It is difficult for this Arbitrator to see where both reading on duty and being involved with marijuana in the manner the Grievant is charged, have equal weight for immediate discharge. A weak "no" is forthcoming from this question.

3. Employer Investigated Before Discharge

This question along with Question No. 4 is the employee's "day in court." An employee should know the offense with which he is being charged and have the opportunity to defend his behavior. Furthermore, the Company's investigation should be made before its disciplinary decision is made. If the Employer fails to do

so, the failure may not usually be excused on the grounds that the Grievant will get his/her day in court through the grievance procedure after the exaction of discipline. By that time there has usually been too much polarization of the parties' positions. In a real sense, the Employer is obligated to conduct himself like a trial court.

In the instant case there are two questionable items in the Employer's investigation of the case. The first was the act or lack thereof of the night Foreman, Jerry Ewing. Part of Management's team, Jerry Ewing, was told that a bust was going down in the Company parking lot involving Company employees. He knew that his shift had been having all types of problems as set forth in the Background Section and, if the Company is to be believed that these problems could in fact be drug related. The employee who testified about telling Ewing of the bust further stated that Ewing just walked away when told of the bust going down. Even when the police came into the plant looking for George Williams, the owner of the white Cutlass, Ewing still refused to get involved in the matter, so much so that top Management did not know until the following week that a lit marijuana cigarette and a bottle of whisky (alcohol of some kind) was found in the white Cutlass. There is also the possibility that had Ewing gone to the scene of the bust as the activity was taking place, the other two men that were allegedly in the white Cutlass with the Grievant could have been identified. Also, the possibility of the second questionable event might not have occurred, namely the overlooking of the fact that Officer Toney found gleanings of marijuana in the Grievant's car on the night of the bust. As the situation now stands, no one with the Company or Union knew about the gleanings until 9/21/83, which was the date the Company Attorney found out about the item when he and Officer Toney inspected the Grievant's arrest record at Police Headquarters. The Union learned about the gleanings at the arbitration Hearing.

One of the rules in arbitration is that the Company must have its proof in hand before it takes disciplinary action against an employee. The Company does not take the disciplinary action and then spend eight months digging up supporting evidence to justify its actions. In addition, the use of the gleanings evidence prevented the Grievant from knowing the full extent of the charge against him. Who knows what action the Grievant or the Union would have taken if the gleanings evidence had been made known from the outset of the Company's investigation. It certainly appears probable to this Arbitrator that the Company would have had a good opportunity to find out about the gleanings evidence if Ewing had not taken the action he did on the night of the bust, namely nothing. As far as the Arbitrator can tell from the testimony present, Ewing never did notify his Management about the Friday night situation. The Plant Manager indicated he questioned Ewing about the events of 1/21/83, but Ewing said he was busy elsewhere in the plant and did not know anything about the situation.

There is a "no" answer, however weak, forthcoming from this question due primarily to the actions of Ewing and the gleanings evidence that was first brought up at the Hearing.

4. The Investigation Was Fair

During the investigation the Company official doing the investigation may be both the prosecutor and the judge, but he may not also be a witness against the Grievant. In addition it is essential for some higher, detached Company official to assume and conscientiously perform the judicial role, giving the commonly accepted meaning to that term in his attitude and conduct. Had this action taken place in the instant situation, perhaps the detached Company official would have asked to see the Grievant's police report record and the gleanings situa-

tion would have been discovered and brought forth before the Grievant was discharged. Apparently, there was no hurry to discharge Grievant. After all, the bust took place on 1/21/83, and the Grievant was discharged on 2/7/83.

Again, there is a weak "no" answer forthcoming in answering this question.

5. Substantial Evidence Supports The Charge Against The Employee

The first question that arises is what should be the level of proof. It is this Arbitrator's opinion that the level of proof is not one requiring that the evidence be conclusive or "beyond reasonable doubt," but the level of evidence must be truly substantial and not flimsy.

The second question is was the Grievant in the white Cutlass at the time of the bust as the police testified or was he standing behind the black Cutlass as he and at least two other employees testified. This decision is a matter of credibility. In order to establish the credibility of one side or another, the testimony of both sides must first be analyzed. The police say the Grievant was sitting in the back seat of the white Cutlass. Two of the police did not know the Grievant on sight and did not have any interest in the case other than arresting the Grievant for possession of marijuana at his home. What then would the police gain by testifying that the Grievant was sitting in the back of the white Cutlass? Absolutely nothing. On the other hand, what would the Grievant gain if he were determined not to have been in the white Cutlass? That would mean he was not in an automobile in which a lit marijuana cigarette was found. In one case the individuals giving the testimony have nothing to gain while the opposing testimony comes from individuals who have everything to gain. As a result, the presumption is placed on the Grievant as the party that has to produce suffice evidence to avoid a ruling against his claim

that he was not in the back seat of the white Cutlass. The Grievant then has the "affirmative of the issue" which he has failed to carry in face of the testimony of the police.

Now that the Grievant has been placed in the back seat of the white Cutlass, the third question is, what direct evidence has the Company offered to indicate that the Grievant either possessed or smoked the marijuana cigarette found in the right hand door ashtray of the white Cutlass?

The gleanings found in the Grievant's car is not accepted as evidence in that the Company had access to the gleanings prior to the Grievant's discharge but failed to find out about them as indicated above. So what other evidence has the Company offered? For one thing, the Company admitted that the marijuana found at the Grievant's home had nothing to do with the Grievant's discharge. No policeman testified that he saw anyone smoking a marijuana cigarette or even any cigarette. Officer Bougere had the Grievant, and the other two men who were in the white Cutlass, under surveillance from the time they walked out of the plant's West door until the rest of the police arrived at the parking lot. During the time that Bougere was observing the three men in the white Cutlass, using binoculars, he was looking into the front windshield of the car in question. Bougere never testified that he saw any of the three men light a cigarette or pass a lit cigarette among themselves. It has been this Arbitrator's experience in other arbitration cases involving the smoking of marijuana, that the involved officer(s) testified to seeing either the marijuana cigarette lit and/or persons passing the marijuana cigarette back and forth between themselves. In addition, the officer(s) generally testified that a marijuana cigarette has a particular burning pattern in which sparks are given off. In other words, a marijuana cigarette could be easily identified by its burning pattern. As

stated before, Officer Bougere did not testify that he saw anyone lighting or smoking any type of cigarette. The time of day that the three men in the white Cutlass might have been smoking a marijuana cigarette was around 6:30 p.m. on 1/21/83. That time of year at 6:30 p.m. it is rather dark, especially inside a car, so that unless someone ducked down very low in the car, it would have been difficult for Officer Bougere not to have seen someone light a cigarette or pass it to another individual. Officer Bougere and McClanahan both testified that they smelled marijuana coming from the white Cutlass as they approached same as the three occupants got out of the white Cutlass and two of them walked back into the plant.

The police arrested the Grievant, as they intended, for possession of marijuana at his house. The police took the cigarette they found in the Cutlass and had it analyzed for marijuana, which it was, but they did not testify to making any attempt to obtain any finger prints from the marijuana cigarette.

Who brought the marijuana cigarette onto the plant? No one proved who did this although the Company admitted that it believed it was the Grievant that did so. However, believing and proving who brought the marijuana cigarette onto Company property are two different things and the Company has not proven that the Grievant was the guilty party by any amount of proof.

Was the Grievant guilty of smoking a marijuana cigarette on Company property? No one testified they saw the Grievant even smoking any kind of cigarette. The only thing that the Company has proven is that the Grievant was sitting in the back seat of a car in which there was found a lit marijuana cigarette in the front seat ashtray, a front seat just moments before vacated by another Company employee.

Even though not binding on the Arbitrator, the Assistant District Attorney chose to not prosecute the

Grievant with respect to the marijuana cigarette found in the white Cutlass. In addition, the Louisiana Unemployment Compensation Commission did not see fit to withhold unemployment compensation when the Company fired the Grievant for violation of the Rule.

The Arbitrator can only say that the Company has not proven by any level of evidence that the Grievant was in violation of the Rule. Again, the Arbitrator would say that had the night Foreman taken an active interest in and gone to the parking area while the bust was taking place, a different set of results might have come about.

There is a "no" answer forthcoming in answering this question.

6. There Was No Discrimination

The Company presented uncontroverted testimony in the President's single statement that the Rule had always been enforced. The Company did not present any specific evidence to support its contention. The Company also had testimony that one individual had been fired at the Greenville Plant. This testimony too was unsupported by any specific evidence. However, the Union did not challenge any of this testimony. On the other hand, the Rule is not restricted to narcotics, it also includes alcohol, which was found by the police in the white Cutlass. Nothing was presented by the Company about its actions in this matter. Again, had Ewing taken some action on the night of the bust perhaps the alcohol matter would also have received some attention. In spite of the Company's testimony, it would appear that the Company in the instant case was more interested in the narcotics issue than in the alcohol issue although there was considerable testimony about how both items probably were having detrimental effects on the Company's production.

The Arbitrator can only say again that there is a weak "no" answer forthcoming from this question.

7. The Degree Of Discipline Was Reasonably Related To The Nature Of The Offense And The Employee's Past Record

A Grievant's record of previous offenses may never be used to discover whether he/she was guilty of the immediate or latest charge. The only proper use of his/her record is to help determine the severity of discipline once he/she has been properly found guilty of the immediate offense.

The Arbitrator may be said to act as an appellate tribunal whose function is to discover whether the decision of the trial tribunal (the Employer) was within the bounds of reasonableness above set forth. In general, the penalty of dismissal for a really serious first offense does not in itself warrant a finding of Management unreasonableness.

In the instant case, in view of the many "no's" forthcoming from the questions, there is also a "no" forthcoming from this question.

In light of the many "no" answers forthcoming from the seven questions, the Arbitrator can only say that the Company did not have just cause to discharge the Grievant under Company Rule II.1.

AWARD

The grievance is sustained. The Company is to restore the Grievant to his job and make him whole of any loss of earnings, seniority, or other fringe benefits. In making the monetary settlement, if the Grievant does not have to repay the unemployment compensation back to the State of Louisiana, the Company can deduct this amount from its financial obligation. Also, the Company can deduct from its financial obligations any monies the Grievant earned between the time he was discharged on 2/7/83 and the date he returned to work for the Company.

The Grievant has two weeks from the date of this Award to present himself to the Company as ready to go to work. The Company has two weeks to place the Grievant on his old job or an equivalent job for which the Grievant is qualified.

The Arbitrator retains jurisdiction for the settlement of the monetary issue only. In the event the parties are unable to agree on the monetary settlement, either or both may petition the Arbitrator to reopen the case for settlement of the monetary issue only.

If the Grievant fails to report to the Company as ready to go to work within the specified time limit he shall be deemed as having resigned from the Company effective 2/7/83, the original date of his discharge. Furthermore, at the time of his discharge the Grievant had been placed on probation for 90 days and was to be paid at the 120 day date (per CE-9) effective January 13, 1983. Since the Grievant was fired on 2/7/83, he had not completed the 20 working days at the 120 day rate so from 2/7/83 through 2/23/83 the Company's financial obligation is for this reduced rate. The 90 day probation is still in effect so that if the Grievant returns to work he still has the 90 day probation left to serve less the time from the probation inception (1/13/83) until the time of his discharge on 2/7/83.

/s/ M. J. Fox, Jr.
M. J. Fox, Jr.
P.E., Ph.D.

October 31, 1983

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-102

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO and QUACHITA LOCAL 654,
Applicants,

v.

MISCO, INC.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case be, and the same is hereby, extended to and including October 1, 1986.

/s/ Byron R. White
Associate Justice of the Supreme Court of the United States

Dated this 13th
day of August, 1986.

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. A-102

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO and QUACHITA LOCAL 654,
Applicants,

v.

MISCO, INC.

ORDER FURTHER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cases be, and this same is hereby, further extended to and including October 20, 1986.

/s/ Byron R. White
Associate Justice of the Supreme Court of the United States

Dated this 22nd
day of September, 1986.